Supreme Court, U.S.
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No. 01-304

In The

Supreme Court of the United States

TITAN INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

Petitioners,

v.

DUANE BEVER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

ALAN C. OLSON
Counsel of Record
ALAN C. OLSON & ASSOCIATES, S.C.
2880 S. Moorland Rd.
New Berlin, WI 53151
(262) 785-9606
Attorneys for Respondent
Duane Bever

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the district court and the Seventh Circuit applied the correct rule of law in upholding the jury's factual determinations that Mr. Bever was qualified under the ADA to perform the Denison job, Titan placed Mr. Bever in the Denison job permanently, the job placement did not result in the elimination of essential functions and, Titan's continuation of this accommodation would not have placed an undue burden on the company.

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STATEMENT OF THE CASE

In this case, the jury was asked to determine whether Titan placed the disabled respondent, Mr. Bever, into a temporary assignment or into a permanent position following the amputation of his leg, and whether Titan's termination of Mr. Bever violated the ADA. The jury found that Titan had assigned Mr. Bever to the Denison job permanently, the assignment did not pose an undue hardship on Titan and, that Titan had lied to the jury about its real reason for discharging Mr. Bever. The Seventh Circuit found the district court did not abuse its discretion in denying Titan's Rule 50 motions because the jury's factual determinations were based on the district court's properly stated rule of law.

Mr. Bever worked as a machine operator for Titan for over 27 years. Mr. Bever has a number of medical problems including diabetes, cancer, a heart condition, and a prosthetic limb. After Mr. Bever's left leg was amputated in October 1993, Titan assigned Mr. Bever to operate the Denison machine only. Mr. Bever was no longer required to perform the "tire mount" job. Mr. Kohl, the Plant Manager, never informed Mr. Bever that this assignment was temporary or limited in any way. Mr. Bever remained permanently employed at the Denison job for approximately a year and a half.

On October 12, 1995, Mr. Bever suffered an insulin reaction in the company parking lot while off duty. Titan put Mr. Bever through a series of physical evaluations to determine if he posed a safety threat to himself or his coworkers. Titan ordered a Job Analysis for Mr. Bever that

included a step-by-step task analysis of Mr. Bever performing only the Denison job. Mr. Bever was not asked to perform the tire mount job for evaluation purposes. The Job Analysis report concluded that "[o]verall, Dwayne Bever's current physical ability matches the job requirements for *the denison position.*" (emphasis added) Dr. David L. Drury, M.D., who was hired by Titan to conduct a Physical Capacity Assessment, also testified that no one from Titan ever informed him that Mr. Bever's assignment to the Denison position was temporary. Dr. Drury testified that if he had been so informed, he would never have ordered a Physical Capacity Assessment to be conducted in the first place because it was clear that Mr. Bever could not perform the tire mount job. Dr. Drury testified that after Mr. Bever's leg was amputated Mr. Bever would have *always* been restricted from using the tire mount machine because "he does not have two good legs."

Despite evaluations from Titan's three hired experts proving that Mr. Bever could safely operate the Denison, Titan placed him on indefinite "lay-off" on April 1, 1996 due only to "safety concerns". On April 23, 1996, the plant's Human Resources Manager wrote a memorandum to Titan's corporate offices specifically indicating that "[i]n October of 1995, Duane was allowed to return to work full-time, *regular duty with no restrictions.*" (emphasis added) Enclosed with this memo was Mr. Bever's written Job Description identifying that his job was the Denison job. The memo made no mention of Mr. Bever's placement into the Denison job being temporary, or that it comprised only a portion of the job's essential functions.

Titan defended its termination of Mr. Bever before the EEOC on the basis that the *only reason* Mr. Bever was not permitted to return to work on December 21, 1995 was that he "could not ambulate safely in a manufacturing environment without posing a direct safety threat to himself and others." Titan made absolutely no mention to the EEOC of the reason Titan provided at trial – that Mr. Bever's Denison job was temporary and that he needed to be able to perform the tire mount function. Mr. Kohl testified at trial that no one from Titan *ever* explained to Mr. Bever that his employment would be jeopardized if he could not perform the tire mount function. Titan also conceded at trial that *nowhere* in Mr. Bever's employment file, or in the submissions to the EEOC, or in communications to Titan's headquarters, did it state that Mr. Bever had been only "temporarily" assigned to the Denison job.

At trial, Titan gave no explanation as to why its officials gave one reason for the discharge to the EEOC and another to the jury. The Seventh Circuit applied the correct rule of law to uphold the jury's determination that Titan's proffered explanation was an "after-the-fact inspiration designed for litigation." (Pt. Ap. 10a) Titan's petition advances this fraud in an effort to create a legal issue where one does not exist.

SUMMARY OF THE ARGUMENT

Titan argues that a writ is necessary in order to maintain "fundamental fairness". (Pt. 8 FN2) It is not fair, Titan argues, that the Seventh Circuit, in an unpublished

decision, declined to reverse the jury's factual findings that Mr. Bever's Denison job was permanent, did not pose an undue hardship on Titan and, that Titan had lied to the jury about its real reason for discharging Mr. Bever. These are the precise factual issues that the parties and the district court had delineated for the jury. Titan concedes that a rational jury could have found in favor of Mr. Bever on all of them. Titan says it nonetheless seeks "clarification" as to what it should do with its disabled employees in order to avoid "punishment" in the future. In response, the jury, the trial court, and the Seventh Circuit, have instructed Titan to comply with the ADA by simply engaging in frank discussions with its disabled employees about the nature of the accommodation being offered to them.

Titan also says that it seeks a writ in order to resolve a "split among the 1st, 6th and 11th circuits". The cases relied on by Titan from these three circuits are three fact-specific determinations emphasizing the need to evaluate, on a case-by-case basis, whether job reassignment or restructuring would reasonably accommodate the disabled employee, without the elimination of essential job functions. There exists no "split" because the district court and the Seventh Circuit applied the exact same legal standards as those applied by the 1st, 6th and 11th circuits. Titan's petition for a writ cannot be granted when the asserted error consists of only the district court's misapplication of a properly stated rule of law.

REASONS FOR DENYING THE WRIT

I. Writ of Certiorari Cannot Be Granted When the Error Asserted is Only the *Misapplication of a Properly Stated Rule of Law*

This petition for a writ cannot be granted when Titan's asserted error consists only of the misapplication of a properly stated rule of law. *S. Ct. Rule 10.* The Seventh Circuit's review would have been more searching if the district court had committed an error of law, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. *Bose Corp. v. Consumers Union,* 466 U.S. 485, 501, 104 S. Ct. 1949, 1960, 80 L.Ed.2d 502 (1984). If the Seventh Circuit believed that the district court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the district court to make those findings. If it was of the view that the findings of the district court did not create issues for trial within the meaning of Rule 56, it could have set them aside on that basis. If after a review of the trial evidence as a whole, there were exceptional circumstances showing a clear abuse of discretion, it could have entered judgment as a matter of law and granted a new trial. If it believed that the district court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the district court's judgment. *Belknap, Inc. v. Hale,* 463 U.S. 8, 77 L.Ed.2d 798 (1983). Here, the district judge properly understood and expressed the current legal standards for a finding of disability discrimination. The district court's ruling that Mr. Bever's failure to accommodate claim would go to trial, is not inconsistent with established case law.

A. The District Court Applied the Same Correct Legal Standards as Those Applied by The First, Sixth and Eleventh Circuits

The district court set forth the applicable legal standard on Mr. Bever's termination claim, as follows: "[I]f an employee cannot perform a job, even if solely because of a disability, there is no ADA claim; discharge for a consequence of disability is not actionable." (Pt. Ap. C 25a, *citing Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997)) The district court further described the proper legal standard by finding that, "Bever's belief that his duties were changed from an assembler – which required him to alternate between the denison and the tire mount/inflate work stations – to work exclusively at the denison work station, *without more* is not enough to support an actionable ADA disparate treatment claim." (Pt. Ap. C. 24a-25a *emphasis added*) The district court also ruled that under the correct legal standard, "[a]n employer is not required to create a new position or provide the specific accommodation the employee requests, but only to provide a reasonable accommodation." (Pt. Ap. C 25a, *citing McCreary v. Libby-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997)) The district court allowed Mr. Bever's accommodation claim to proceed because an issue of fact existed as to whether Mr. Bever's placement into the Denison position was temporary or permanent.

The First Circuit case, *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), cited by Titan as a divergence from authority, applied the precise legal standard our district court had used: "[W]e agree with the Seventh Circuit that evidence that accommodations were made so

that an employee could avoid a particular task 'merely shows the job could be restructured, not that [the function] was non-essential.' " *Id.* at 26, *citing Basith v. Cook County*, 241 F.3d 919, 930 (7th Cir. 2001) (delivery of medicine remained essential function of job despite special assignment allowing employee not to deliver medicine for period of time).

The Sixth Circuit decision cited by Titan, *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999), does not represent a split of authority because the *Bratten* court used the same standard set forth by the district court below. The *Bratten* court specifically found as a matter of law that "employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his disability." *Id.* at 633-634, *citing Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 913 (7th Cir. 1996) (having a helper perform "most if not all" of roof bolter tasks were "extraordinary," not reasonable accommodations).

The essential job function standard applied by the district court in Mr. Bever's case was also the same as that set forth in *Holbrook v. City of Alpharetta, Georgia, et al.*, 112 F.3d 1522 (11th Cir. 1997), as follows:

> Federal regulations promulgated pursuant to the ADA expressly note that [a]n employer or other covered entity may restructure a job by reallocating or redistributing non-essential, marginal job functions. . . . An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who

> holds the job would have to perform, with or without accommodation, in order to be considered qualified for the position.

Id. at 1527-28 *citing* 29 C.F.R. Part 1630, Appendix at 344

Because all three decisions relied on by Titan used the same legal standard as the district court did below, a "split of authority" does not exist. A district court's misapplication of a correctly stated rule of law in its dismissal of Mr. Bever's termination claim, would not be a proper subject of a petition for writ. (*S. Ct. Rule 10* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

B. The Seventh Circuit Applied the Same Correct Legal Standards As Those Applied by the First, Sixth and Eleventh Circuits

Titan's next claim is that the Seventh Circuit's order is faulty because "it holds that, where an employee asserts he did not understand his work assignment was temporary, he can, contrary to the ADA's terms, claim that he was a qualified individual with a disability who could perform the functions of his assignment rather than his 'employment position'." (Pt. Br. 3) The Seventh Circuit actually held as follows:

> Because Bever was allowed to work exclusively at the Denison work station for nearly a year and a half and there were no meaningful discussions between Titan and Bever about the nature of the accommodation, we think that whether the assignment was temporary or permanent was unclear to him, and he can claim he was a

> qualified individual for the job he held. . . . Two separate work place assessments started with the presumption that the job they were evaluating Bever for was the Denison job. In addition, a number of internal company memos allow the inference that the Denison job became Bever's work assignment. . . . Another company official informed the Equal Employment Opportunity Commission that the company 'put Mr. Bever in the Denison position . . . which is the lightest and easiest job we have in the entire plant.'

(Pt. Ap. 6a, 9a, 10a)

Both the district court and the Seventh Circuit relied not only on Mr. Bever's perception that his job was permanent, but also on the duration he was working in the job, Titan's classification of Mr. Bever's job in its own documents, Titan's representations to the EEOC that Mr. Bever's job was the Denison, the failure by Titan to interact with Mr. Bever regarding the nature of the accommodation and, Titan's failure to determine whether it would be overly expensive to allow Mr. Bever to continue the Denison position. The Seventh Circuit measured these factual findings against the standard set forth in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), for proper review of a Rule 50 motion. (Pt. Ap. A. 4a-5a) The decisions in *Phelps, Bratten* and *Holbrook* applied the same legal analysis to the particular facts of each respective case, as that used by the Seventh Circuit below.[1]

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[1] *Phelps v. Optima Health, Inc., supra* 251 F.3d 21, 25, 27-28 (1st Cir. 2001) (Essential job functions are determined from the employee's perception of her job, the employer's job

The Seventh Circuit then proceeded to the issue of determining the scope of Titan's duty to accommodate Mr. Bever through job reassignment and/or restructuring. The Seventh Circuit applied the proper legal standard set forth in *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 697 (7th Cir. 1998), as follows:

> *Hendricks-Robinson* involved the precise issue before us: whether light-duty jobs were temporary. We said that if the jobs were truly temporary, the company was not required 'to convert them into permanent ones for permanently

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description, the change in job duties without knowledge or approval of Human Resources, no permanent job-sharing arrangement and the employee's failure to cooperate with the required interactive process); *Bratten v. SSI Services, Inc., supra* 185 F.3d 625, 634-635 (6th Cir. 1999) (No duty to reassign when employee did not apply for posted positions as required by the collective bargaining agreement, the job descriptions showed that all of the positions identified for reassignment required the same physical skills as the original job employee was not qualified to perform, and the employee's expert did not demonstrate that employee was otherwise qualified for the other positions to which he sought re-assignment.); *Holbrook v. City of Alpharetta, Georgia, et al., supra* 112 F.3d 1522, 1528 (11th Cir. 1997), ("It is critical to note that our conclusion is mediated by the facts presented in this case. Our decision is informed by several specific factors, including the unique nature of police work, the particular realities of a small police department in which each of three detectives is expected to be able to respond to any situation, and the types of accommodations proposed by Holbrook. We do not imply that an employer invariably is absolved from having to make reasonable accommodations for a disabled employee whenever a given job involves any measure of unpredictability, nor do we suggest that police departments in general cannot be held strictly to the standards set forth in the ADA.")

> restricted employees.' However, the company has not made it clear whether the jobs were temporary or permanent: '[I]t remains a question of fact whether the jobs were temporary.' At 697. In that case, as well, there was a question of fact 'whether the injured employees knew that the jobs in which they initially were placed were truly temporary or whether they could consider the jobs a reasonable accommodation for their impairments.' At 698.

(Pt. Ap. A 8a)

The fact-intensive inquiry as to whether the assignment was permanent or temporary is a standard that is applied universally by all circuits that have examined the issue. *Bratten v. SSI Services, Inc., supra* 185 F.3d 625, 633-634 (6th Cir. 1999).

Finally, the Seventh Circuit analyzed Mr. Bever's pretext issue pursuant to this Court's standard set forth in *Reeves,* as follows:

> [A]fter *Reeves,* Bever can prevail by convincing the jury that, in fact the stated reason for his firing was pretexual. . . . The [Reeves] Court found that in a proper situation a prima facie case 'combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.' 120 S. Ct. at 2109

(Pt. Ap. A 10a)

In the present case, Titan gave no explanation as to why its officials repeatedly gave one reason for the discharge to the EEOC and another to the jury. Because

Titan's own documents, created through careful collaboration between its senior managers, leave no doubt that Mr. Bever was terminated solely because he was erroneously perceived to be a "safety threat", the Seventh Circuit reasonably accepted the jury's determination that the expiration of Mr. Bever's job was an "after-the-fact inspiration triggered by the necessity of fending off this litigation." *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th Cir. 1987).

If the Seventh Circuit believed that the district court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the district court's judgment. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S. Ct. 1527 (1986). It is not the function of this Court to now review the Seventh Circuit's unpublished order that declines to reverse the district court's order based on correctly stated and unpublished legal standards. *S. Ct. Rule 10.*

II. Titan's Petition Relies on Overruled Case Law and Ignores Express Language of ADA

Titan claims that Mr. Bever does not meet the definition of "qualified individual with a disability" because he could not perform the essential functions of his *existing* job in the assembly department regardless of the level of accommodation offered. Titan maintains that "[t]he express language of the ADA, as well as decisions of this Court . . . " support its argument. (Pt. 9) In this argument, Titan is in error, and the error is easy to identify.

A. Titan's Petition is Based on Overruled Law

The first pitfall Titan encounters is its reliance on *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 287 n.17, 107 S. Ct. 1123, 1131 n.17 (1987). (Pt. 10) *Arline*, a Rehabilitation Act case, no longer provides the applicable standard. *Arline* predates the 1992 amendments to the Rehabilitation Act, which substantially changed the standards used in determining whether the Act is violated. *See Shiring v. Runyon*, 90 F.3d 827, 831-32 (3rd Cir. 1996) (stating that under *Arline* employers were not required to reassign disabled employees, but that after the 1992 amendments reassignment is mandatory unless it would cause the agency undue hardship).

B. Titan's Petition Ignores Express Language of ADA

The second fatal infirmity of Titan's analysis is that its reading of the Act ignores the last two words of the statutory definition of "qualified individual with a disability," the last two words being "or desires." 42 U.S.C. § 12111(8). Although a "qualified individual with a disability" has to be someone who can perform the essential functions of *a job*, that inquiry is not limited to the employee's existing job. Rather, the plain language of the statute includes an employee who has the ability to do other jobs within the company that such disabled employee "desires." 42 U.S.C. § 12111(8). To read the ADA otherwise, would render the word "desires" meaningless, and the Court must avoid such a construction. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S. Ct. 1061,

131 L.Ed.2d 1 (1995) ("the Court will avoid a reading which renders some words altogether redundant").

The legal standard applied below, that a "qualified individual with a disability" includes a disabled employee who desires and can perform with or without reasonable accommodation an available reassignment job within the company, though unable to perform his or her existing job, is reinforced by an examination of the ADA's definition of "reasonable accommodation." The ADA definition of "reasonable accommodation" lists the kinds of reasonable accommodations that may be required of an employer. Reasonable accommodations may include, "*job restructuring, . . . reassignment to a vacant position, . . . and other similar accommodations* for individuals with disabilities." 42 U.S.C. § 12111(9) (emphasis added). The term "reassignment to a vacant position" indisputably indicates more than just an alteration to the employee's existing job. A proper reading of "qualified individual with a disability" includes individuals who can perform a reassignment job within the company, with or without reasonable accommodation, even though they cannot perform their existing job no matter how much accommodation is extended. *Every* circuit that has considered the issue supports this interpretation.[2]

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[2] The case Titan cites as divergent from authority, *Bratten v. SSI Services, Inc., supra* 185 F.3d 625, 633-634 (6th Cir. 1999), found that, "every circuit – including this one – to consider the issue has properly held that the ADA requires an employer to consider re-assignment to a vacant position if the disabled employee cannot be reasonably accommodated in his or her current job."

III. Titan's Irrational Fear of "Punishment" and Being Forced to "Discriminate Against Non-Disabled Workers," Despite Safeguards Built Into the Act by Congress, Do Not Make For An *Issue of Recurring National Importance*

Titan harbors the irrational fear that if it accommodates an employee through job restructuring and/or reassignment in the future, it will be "punished" and forced to "discriminate against non-disabled employees". (Pt. 20; Pt. Ap. 5a-6a) As stated by the district court, and the Seventh Circuit, Titan is protected from liability through the safeguards afforded by Congress.

A. Titan's Self Interests Are Protected By Congressional Safeguards

The scope of the employer's obligation to offer an employee reassignment is constrained by Congress's intent as expressed in the Act. First, an employer need not create a new job or modify an essential function of a vacant job. Second, if other employees have a seniority or contractual right to the position, it is not considered vacant for purposes of reassignment. Third, the employer need not make the reassignment nor restructure a job unless the employee is truly qualified to do the new job. Fourth, the employer has the ability to pick and chose which appropriate vacant job will be assigned to the otherwise qualified disabled employee. Fifth, no reassignment is required if it is not a "reasonable" accommodation or if it poses an undue hardship. Congress felt that these were sufficient safeguards. With these protections in place, there is no "recurring and significant issue of

national importance" that remains unchecked. If further limitations are to be sought by Titan, they must come from Congress. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999); 42 U.S.C. §§ 12112(b)(5)(A), 12111(9).

B. A Writ Cannot Be Sustained Upon Only Titan's Exclusive Motive To Elude Two Unpublished Orders

Titan further claims that "[f]undamental fairness requires that the Seventh Circuit's decision's status as 'unpublished' not mitigate against review by this Court, as there is no less a conflict than if the Seventh Circuit decision at issue here were published." (Pt. 8 FN2) Titan's desire for fairness is not validated by the Rules under the facts of this case.

Contrary to Titan's argument, Circuit Rule 53 provides that "unpublished decisions . . . shall not be cited or used as precedent [ ] in any federal court within the circuit in any written document or in oral argument; or [ ] by any such court for any purpose." *Id.* Circuit Rule 53 further states that "a published opinion will be filed when the decision (i) establishes a new, or changes an existing rule of law; (ii) involves an issue of continuing public interest; (iii) criticizes or questions existing law; (iv) constitutes a significant and non-duplicative contribution to legal literature (A) by a historical review of law, (B) by describing legislative history, or (C) by resolving or creating a conflict in the law . . . ". *Id.* In contrast, when the decision does not satisfy the criteria for publication, it will be filed as an unpublished order. *Id.*

Not only are the decisions below void of any precedential value or legal effect, they do not establish a new, or change an existing rule of law; involve an issue of continuing public interest; criticize or question existing law; contribute to legal literature or resolve or create a conflict in the law. Where the district court and Seventh Circuit orders do not come close to meeting the minimum requirements for publication, it cannot be claimed that they give rise to a "recurring issue of national importance" – especially when the only party negatively affected by the unpublished orders below, was Titan.

CONCLUSION

For the forgoing reasons, the petition for a writ must be **DENIED**.

Dated this 19 day of September, 2001.

Respectfully submitted,

Attorneys for Respondent
Duane Bever

ALAN C. OLSON
ALAN C. OLSON & ASSOCIATES, S.C.
2880 S. Moorland Rd.
New Berlin, WI 53151
(262) 785-9606

Of Counsel:
ROBERT M. MIHELICH
LAW OFFICES OF ROBERT M. MIHELICH
2665 S. Moorland Rd., Ste. 200
New Berlin, WI 53151